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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 79

LEO H. STEELE, *Petitioner*

vs.

GENERAL MILLS, INC., *Respondent*

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

May It Please The Court:

CITATION OF OPINION BELOW

The opinion of the Circuit Court of Appeals, Fifth Circuit is reported in Vol. 154 Fed. (2nd) page 367.

GROUNDS OF JURISDICTION

Jurisdiction is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. A. Sec. 347) and under Supreme Court Rule No. 38, Sec. 5.

The opinion of the Circuit Court of Appeals for the Fifth Circuit was filed January 8, 1946; petition for rehearing was filed January 28, 1946; opinion on rehearing was filed February 15, 1946, and decree entered February 15, 1946. Application for stay of mandate, pending application in this Court for Writ

of Certiorari, was filed February 19, 1946, and order staying the mandate for sixty days, pending the application for Writ of Certiorari in this Court, was entered February 21, 1946—Petition for Certiorari was granted by this Court on May 27, 1946. (R. 346.)

PRELIMINARY STATEMENT

The trial court decided every issue in this case favorable to the petitioner and adversely to the respondent. (R. 87, 88, 104.) The respondent appealed to the Fifth Circuit Court of Appeals, which court likewise decided every issue favorable to the petitioner and adversely to the respondent, except the one issue of pari delicto and reversed the case on this point. (R-print 303-320.)

This brief will be divided into two sections. Section One will deal with the subject of pari delicto in rate cases. This was the one issue decided by the Circuit Court of Appeals and it is the controlling point in this case. There is nothing else before the court.

The respondent filed a brief in reply to the petitioner's Application for a Writ of Certiorari in which it attempted to raise immaterial issues. In Section Two of this brief we shall attempt to cite the authorities that make the position of the respondent untenable, even on such immaterial issues.

NATURE OF THE CASE

In 1931 the Legislature enacted Article 911b, Section 1 to 22b inclusive, Vernon's Annotated Civil Statutes, relating to all motor carrier operations over the highways by truck, and authorized the Texas Railroad Commission to fix the rates and regulate all carriers for hire.

Immediately after the Legislature enacted the law, the Commission established rates for contract carriers (R. 133, 134, 135), with an amendment thereto in 1940. (R. 136-137.) Petitioner is a resident citizen of Texas. The respondent is a Delaware corporation with a permit to do business in Texas. (R. 139.) Diversity of citizenship is the basis of jurisdiction in the Federal Court. On the 26th of August 1940 petitioner (who will hereinafter be referred to as carrier) entered into a written contract with respondent (who will hereinafter be referred to as shipper) by the terms of which the carrier agreed to transport, and the shipper agreed to ship, certain commodities from its flour mill in Wichita Falls, Texas, to various cities and towns within the State of Texas. By the terms of said contract, it was agreed that the carrier would charge and the shipper would pay the rates therefor as fixed by the Railroad Commission of Texas. (R. 116-122 inclusive.) Pursuant to the regulations of the Commission, the carrier filed an application with the Commission August 26, 1940, seeking authority to operate over Texas highways as a contract carrier for hire on behalf of the shipper to haul its commodities from its mill in Wichita Falls. This application was in writing

on the forms as provided by the Commission, and in response to one of the requirements of the Commission, it was provided "applicant proposes that the tariff to be charged for the services proposed to be rendered will be that as promulgated by the Railroad Commission of Texas." (R. 67-75.)

Pursuant to the rules of the Commission, notice was given and public hearings were held, at which hearings the carrier appeared in person, and the shipper, through its traffic manager, Mr. McCraney, appeared and testified under oath before the Commission concerning the proposed operation. (R. 143.) On June 16, 1941, the Commission entered its order granting in part and denyng in part the contract carrier application. (R. 124-129.) In this order the Commission found:

> "The Commission, after carefully considering the evidence, the laws and its own rules and reguiations, is of the opinion that the character of business proposed to be done by the applicant strictly conforms with the definition of a contract carrier; * * * In connection with the rates, the Commission directs attention to its tariffs and orders prescribed as a minimum rate to be charged by contract carriers the rates prescribed for common carrier motor carriers." (R. 127.)

See rate orders of the Commission. (R. 133-136.) The Commission entered its order authorizing the operation June 16, 1941 (R. 124), and then the Commission issued the Permit July 9, 1941 (R. 130). Subsequent thereto, namely July 31, 1941, the carrier and the shipper entered into a second contract (R. 208), which

provided that the shipper would pay, and the carrier would collect, a rate less than the one prescribed by the Commission.

The freight charges were collected in accordance with the terms of the second contract. This suit is one for the undercharge in rates; that is, the difference between the amount actually collected, and the amount due according to the rate fixed by the Commission.

The trial court gave an instructed verdict for the plaintiff (carrier) (R. 87), and, pursuant to such instruction, the jury returned a verdict for the carrier. (R. 87.) The court then entered its final judgment on December 27, 1944, in favor of the carrier in the sum of $37,884.82, together with six per cent interest (R. 104-7), which represented the difference in the amount collected under the second contract, and the amount that would have been collected according to the terms of the first contract, and pursuant to the rate orders of the Railroad Commission. Said total included the transportation tax. The trial judge also entered Findings of Fact and Conclusions of Law. (R. 88 to 99 inclusive.)

The opinion in the Circuit Court was divided two to one with Judge Joseph C. Hutcheson, Jr., of Texas dissenting on the grounds that the rule of pari delicto could not apply to this freight rate under-charge case because of the overriding public policy.

SPECIFICATIONS OF ERRORS

1. The Circuit Court of Appeals erred in holding that a Delaware Corporation could enter Texas and have its commodities transported over the Texas highways and evade the payment of the freight rates therefor as fixed by the Railroad Commission, by the simple device of entering into a second contract with the carrier for a lower rate, after the Commission had issued a permit and fixed the rate.

2. The Circuit Court of Appeals erred in not applying the standards of rates, as fixed by the Texas Legislature, and by the Railroad Commission, for contract carriers operating on Texas highways, when said court refused to allow a carrier to collect said legal rate, and, in effect, allowed a shipper to escape the payment of the legal rate simply because the shipper and the carrier entered into a second contract for a lesser rate.

3. The Circuit Court of Appeals erred in holding that a carrier could incapacitate or estop himself from collecting the freight rates as fixed by the Railroad Commission by entering into a second contract with the shipper for a lesser rate.

4. The Circuit Court of Appeals erred in holding that the public policy of Texas was contrary to the announced public policy as declared by the Legislature, the State courts, the Attorney General and the Federal District Court sitting in Texas.

5. The Circuit Court of Appeals erred in holding that a carrier was estopped from collecting the legal freight

rate fixed by the Railroad Commission, because the carrier had entered into a second contract for a lesser rate, since the carrier did not rely upon nor seek the aid of the second contract.

6. The Circuit Court of Appeals erred in holding that the public interest in freight rates did not override the pari delicto rule.

7. The Circuit Court of Appeals erred in holding that a carrier did not have a right and a duty to collect from a shipper the rate as fixed by the Railroad Commission for the transportation of the shipper's commodities over Texas highways.

8. The Circuit Court of Appeals erred in deciding this case upon facts and issues not considered by the the trial court.

SECTION ONE

(Relating to the Pari Delicto Rule)

ARGUMENT AND AUTHORITIES

There is no controversy between the parties as concerns the facts: the carrier actually transported 424,919,582 pounds of freight for the shipper over Texas highways by truck during the period involved; the carrier was paid $44,803.33 for such transportation services. Applying the rate fixed by the Commission and the rate agreed upon in the first contract, the amount would have been $77,814.98, including transportation tax. The operation was by virtue of a permit issued by the Railroad Commission. (R. 130.) The original contract between the parties provided:

> "It is mutually agreed between the parties that the rate to be charged by the first party and paid by the second party for the services contemplated to be rendered as provided in this contract shall be such rates, charges or tariffs as may be fixed by the Railroad Commission of the State of Texas, and in conformity with the rules and regulations now in existence or that may hereafter be promulgated by said Commission for the kind and character of service to be rendered hereunder." (R. 120-121.)

This contract was exhibited to the Commission pursuant to its rules and was offered in support of the application for the Permit. (R. 243-4.) The application for the Permit addressed to the Commission provided in part:

> "Applicant proposes that the tariff to be charged for the service proposed to be rendered will be that as promulgated by the Railroad Commission of Texas." (R. 70.)

The Permit as issued by the Commission contained the following provision:

> "This permit to remain in effect from and after the date hereof, subject to the provisions of Chapter 277, Acts Regular Session of the Forty-second Legislature, 1931; the further orders of the Commission; and the Rules and Regulations of the Railroad Commission of Texas, *heretofore prescribed or which may be hereafter prescribed* under and pursuant to authority conferred upon it by law." (R. 130-132.)

The orders of the Commission relating to rates is

the largest body of Commission regulations pertaining to carriers and perhaps the most important.

One of these important orders is contained in Item 470 of Class and Commodity Tariff No. 1-A as follows:

> "Section No. 3. General Application of Rates. Item No. 470. Rates, Rules and Regulations in this Tariff, or as May be Amended, Shall be Observed: * * * (B) By contract carriers as minimum, on Texas Intrastate Traffic, etc." (R. 136-137.)

The Commission's reference to rate requirements under the permit as found in Commission order granting the permit is quoted at page 4 of this Brief.

Subsequent to the granting of the Permit by the Commission, the carrier and the shipper entered into a second contract which provided for a rate less than the one fixed by the Commission. (R. 208.) This second contract was never submitted to, nor approved by, the Commission. (R. 245.) In this case the carrier sued for the difference between the amount he collected under the second contract, and the rate fixed in the first contract and the tariff rate fixed by the Commission.

TWO QUESTIONS OF LAW CONTROL

There are two controlling and related questions of law in this case; (1) Is petitioner (the carrier) estopped or incapacitated from prosecuting this suit against the respondent (shipper) to collect the tariff rates legally fixed by the Commission, solely because he en-

tered into a second contract to charge and did charge and collect from respondent, a lesser rate?; (2) Since petitioner did not sue upon, nor seek nor require any aid from the second contract, which provided for a rate less than the rate legally fixed by the Commission, but made out his case without reference to this second contract, is he thereby prevented or estopped from recovering the legal rate, even though he be in pari delicto?

The majority opinion of the Circuit Court of Appeals decided both questions adversely to the petitioner, with Justice Hutcheson dissenting. The judgment of the Circuit Court is contrary to, and directly in conflict with, the enactments of the Texas Legislature, the decisions of the State courts, the opinion of the Attorney General, and the decision of the trial court sitting in Texas.

THE DOCTRINE OF PARI DELICTO CANNOT BE APPLIED TO A RATE CASE

In Texas the Railroad Commission fixes the rates for all carriers. Article 911b, Sec. 4 (a) reads:

> "The Commission is hereby vested with power and authority and it is hereby made its duty to supervise and regulate the transportation of property for compensation or hire by motor vehicle on any public highway in this State, to fix, prescribe or approve the maximum or minimum or maximum and minimum rates, fares and charges of each motor carrier in accordance with the specific provisions herein contained, * * * and to supervise and regulate motor carriers in all matters

affecting the relationship between such carriers and the shipping public whether herein specifically mentioned or not."

"4 (c) The Commission is further authorized and empowered, and it shall be its duty, to supervise and regulate motor carriers in all matters affecting the relationship between such motor carriers and the shipping public that may be necessary in the interest of the public.

"4 (d) * * * and to relieve the existing and all future undue burdens on the highways arising by reason of the use of the highways by motor carriers, adusting and administering . s regulations in the interests of the public.

"6aa. The Commission is hereby vested with power and authority and it is hereby made its duty to prescribe rules and regulations covering the operation of contract carriers in competition with common carriers over the highways of this State and the Commission shall prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service.

"Sec. 20. If any motor carrier or other party at interest be dissatisfied with any decision, rate, charge, rule, order, act, or regulation adopted by the Commission, such dissatisfied person, association, corporation, or party after failing to get relief from the Commission may file a petition setting forth the particular objection to such decision, rate, charge, rule, order, act or regulations, or to either or all of them in the District Court in Travis County, Texas, against said Commission as defendant. Said action shall have precedence over all other causes on the docket of a dif-

ferent nature and shall be tried and determined as other civil causes in said court. Either party to said action may appeal to the Appellate Court having jurisdiction of said cause and said appeal shall be at once returnable to said Appellate Court having jurisdiction of said cause and said action so appealed shall have precedence in said Appellate Court over all causes of a different character therein pending; provided, that if the court be in session at the time such right of action accrues the suit may be filed during such term and stand ready for trial after ten days' notice. In all trials under this section the burden of proof shall rest upon plaintiff, who must show by the preponderance of evidence that the decisions, rates, regulations, rules, orders, classifications, acts, or charges complained of are unreasonable and unjust to it or them. The Commission shall not be required to give any appeal bond in any cause arising hereunder and no injunction shall be granted against any order of the Commission without hearing unless it shall clearly appear that irreparable injury will be done the complaining party if the injunction is not granted.

"Sec. 22b. Declaration of Policy. The business of operating as a motor carrier of property for hire along the highways of this State is declared to be a business affected with the public interest. The rapid increase of motor carrier traffic, and the fact that under existing law many motor trucks are not effectively regulated, have increased the dangers and hazards on public highways and make it imperative that more stringent regulation should be employed, to the end that the highways may be rendered safer for the use of the general public; that the wear of such high-

> ways may be reduced; that discrimination in rates charged may be eliminated; that congestion of traffic on the highways may be minimized; that the use of the highways for the transportation of property for hire may be restricted to the extent required by the necessity of the general public, and that the various transportation agencies of the State may be adjusted and correlated so that public highways may service the best interest of the general public. Added Acts 1931, 42nd Leg., p. 480, ch. 277, Sec. 21."

Article 6448 relates to railroads.

Thus the Statutes of Texas vest exclusive authority in the Railroad Commission to prescribe rates. A different rule to this prevails with the Interstate Commerce Commission, which merely requires that the carrier file and publish its rates, which become the lawfully published rates unless suspended or cancelled by affirmative action of the Interstate Commerce Commission. *Texarkana & Ft. S. Ry. Co. v. Houston Gas & Fuel Co.*, 51 SWR (2nd) 284.

The Supreme Court of Texas in the early case of *Railroad Commission v. Weld & Neville*, 73 SWR 529, announced the rule as follows:

> "The Railroad Commission Law deprived railroad companies of the power to make rates, and conferred that authority upon the commission, * * *."

In the case of *Missouri-Kansas & T. R. Co. of Texas v. Railroad Commission of Texas*, 3 SWR (2nd) 489, affirmed in 13 SWR (2nd) 679, the Court held:

> "In the State Act, * * * the rate making power is taken away from the carriers altogether, and vested exclusively in the Commission, * * *."

A more recent case is that of *Railroad Commission v. Uvalde Construction Co.*, 49 SWR (2nd) 1113-4, wherein the court said:

> "Here the Railroad Commission itself fixes the rates, and that rate is conclusively presumed to be reasonable, just, and not discriminatory, until declared otherwise by a court of competent jurisdiction."

In the case of *West Texas Compress & W. Co. v. Panhandle & S. F. Ry. Co.*, 15 SWR (2nd) 558, the court said:

> "Since the commission is an instrumentality of the state, exercising delegated powers, its orders are of the same force as would be a like enactment of the Legislature."

Likewise, all rate orders promulgated by the Commission are written into and become a part of every contract of shipment that is made. Such was the holding in the case of *Texas C. Ry. Co. v. Kerns*, 108 SWR 187, wherein the court said:

> "In every contract of shipment in this state the law writes the particular rate fixed and authorized by the Railroad Commission of Texas."

THE CARRIER HAS A PUBLIC DUTY TO COLLECT, AND THE SHIPPER TO PAY, THE TARIFF RATES AS FIXED BY THE COMMISSION

In the case of *Texas and New Orleans Railway Company v. East Texas Gravel Company*, 175 SWR (2nd) 435, involving an intrastate shipment the rule was stated as follows:

> "We further recognize that railroad companies are charged with a public duty to collect the full amount of freight charges, according to the rate fixed by the Railroad Commission, and that they cannot by means of estoppel, or by any other device, escape performance of this public duty. Texas & N. O. R. Co. v. Yates, 139 Tex. 89, 161 SWR (2nd) 1050."

Likewise, the Supreme Court of Texas in the case of *Texas & N. O. Ry. Co. v. Yates, et al*, 161 SWR (2nd) 1050, involving intrastate shipments held:

> "The railroad company could not by means of estoppel 'or by any other device' escape the performance of this public duty. * * *
>
> "In a word the purpose of our statutes, as they relate to intrastate freight rates, is in every essential respect the same as that of the Federal statutes which we had under consideration in Houston & T. C. R. Co. v. Johnson, Tex. Com. App. 41 SW (2nd) 14, 83 A. L. R. 241."

The Texas Supreme Court in the case of *H. & T. C. R. Company v. Johnson*, 41 SWR (2nd) 14, held:

> "The provisions of the statutes are such as to

> make the collection of those charges a public duty on the part of the carrier, and to incapacitate the carrier to refund or to remit 'in any manner or by any device' any portion of such charges. Johnson was charged with knowledge of these statutory provisions and of their legal affect. He relied at his peril on the representation that the freight charges had been prepaid; for he was charged with knowledge that the carrier could not by that means evade the public duty, imposed by the statutes, to collect the full amount of charges lawfully due."

The law fixing the right and duty of a carrier to collect, and the shipper to pay, the rates prescribed by the Commission, applies both to rail and truck transportation. *Herrin Transportation Co. v. Marmion*, 113 SWR (2nd) 291.

This court has many times passed on the question involved. Reference is here made to the case of *L. & N. Ry. v. Central Iron and Coal Company*, 265 U. S. 59, 68 L. Ed. 900, in which the rule was stated:

> "No contract of the carrier could reduce the amount legally payable, or release from liability a shipper who had assumed an obligation to pay the charges. Nor could any act or omission of the carrier (except the running of the statutes of limitations) estop or preclude it from enforcing payment of the full amount by a person liable therefor."

The reasons assigned by all of the courts in refusing to permit a shipper to evade the rates fixed by the

Commission is that such rule will prevent rebates and discrimination.

The respondent on pages 46 and 47 of its brief said:

> "It is also conceded that the purpose of the act under which the permit was granted was * * * to protect common carriers against destructive, unfair and discriminatory competition by other motor carriers in the use of the highways."

This admission that the act, like the railroad rate act, was designed to prevent discrimination, clearly demonstrates that such rates can no more be evaded, wilfully or by inadvertence, than can the railroad rates be so evaded.

See *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553.

There can be no discrimination because every other shipper and every other carrier, operating in Texas, is subject to the same regulations and the same classification of rates for the same commodities to every other member as a class of which such carrier or shipper may belong.

The decision of the Circuit Court in this case is not only in conflict with the Supreme Court of Texas and the Supreme Court of the United States, but also that of other Circuit Courts. The Eighth Circuit Court of Appeals passing on the question involved in the case of *New et al v. Denison Clay Co.*, 260 Fed. 70, held:

> "A carrier is required by law to collect, and the shipper to pay, the tariff rate on interstate shipments. This mutual obligation of carrier and

shipper cannot be affected by mistake, design, or even positive contract to the contrary. It is a liability arising from and fixed by law, exists independent of contract, and attaches to the status of interstate carriage."

To like effect see *Bottemueller v. Wilson & Co.*, 57 Fed. Sup. 766, wherein it was said:

"Quite obviously the suit is one on a hauling or transportation contract. The plaintiff undertook to perform certain services for the defendant for a compensation set out in schedules attached to a written contract. The schedule of charges did not agree with published rates filed by the plaintiff and promulgated by him as an interstate contract carrier by motor. Under such circumstances the published tariffs superseded the agreed rates and entered into and became a part of the contract just as effectively as if written therein."

An interesting case from the State of Massachusetts, which state has a motor carrier statute almost identical with that of Texas, is that of *Papetti v. Alicandro*, 58 NER (2nd) 155, in which case the contract carrier, who later changed to a common carrier, contracted with the shipper to charge a rate as promulgated by the Commission and did charge such rate. After the collection of the rate, by private contract the carrier rebated to the shipper the cash according to the terms of the private contract. After discussing the facts and the law at great lengh the court held:

"Unless the plaintiff is prevented by some rule of law, he is entitled to maintain this action. We

> think that the plaintiff not only is not so barred, but that is is both his right and duty to recover the rebates. * * * 'Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay.' Kansas City Southern R. Co. v. Carl, 227 U. S. 639. 'The transaction between the parties amounted to an assumption by the consignee to pay the only lawful rate it had the right to pay or the carrier the right to charge. The consignee could not escape the liability imposed by law through any contract with the carrier'." (Citing many cases.)

The court then proceeded to cite the case of *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516, 83 L. Ed. 953, in which the Supreme Court of the United States said:

> "This Court has had occasion recently to sustain action of the Commission aimed at carriers' practices resulting in collection of less than the tariff rate. It is equally important to aid the efforts of a carrier in collecting published charges in full. Involuntary rebates from tariff rates should be viewed with the same disaprpoval as voluntary rebates."

THE LAWFULLY PRESCRIBED TARIFF RATES CANNOT BE ESCAPED EVEN BY WILFUL DESIGN

The Supreme Court of Texas in *H. & T. C. R. Company v. Johnson*, 41 SWR (2nd) 14, correctly stated the rule as follows:

> "The provisions of the statutes are such as to make the collection of those charges a public duty on the part of the carrier, and to incapacitate the carrier to refund or to remit 'in any manner or by any device' any portion of such charges."

See also *Texas N. O. R. Co. v. Yates, et al*, 161 SWR (2nd) 1050:

> "The railroad company could not by means of estoppel '*or by any other device*' escape the performance of this public duty."

This court passed on the question in the case of *N. Y., New Haven & Hartford R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 50 L. Ed. 515, where it was held:

> "The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purposes of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was that purpose? It was to compel the carrier, as a public agent, to give equal treatment to all."

For decisions in other jurisdictions reference is made to 83 *A. L. R.*, pages 245 et seq., where the cases are summarized in *Georgia R. Co. v. Greety*, 5 Ga. App. 424, 63 S. E. 528, as follows:

> "'Some of these cases, and among them the Georgia case of Savannah, F. & W. R. Co. v. Bundick (1894), 94 Ga. 775, 5 Inters. Com. Rep. 289, 21 S. E. 995, supra, refer to the principle that, where the parties have agreed to violate the laws, the courts will not allow an action as to that matter in favor of either of them; and from this it might seem at first blush that, the shipper and the carrier having contracted for the transportation of the goods at a rate the very charging or accepting of which is a violation of law, the whole contract of transportation would be unlawful, and that the courts would not give aid to a carrier seeking to collect for the transportation charges or any part thereof, where it becomes necessary for the carrier to assume the role of plaintiff. Upon maturer reflections we are of the opinion that this position is untenable.'"

CARRIER SOUGHT NO AID FROM ILLEGAL CONTRACT

We agree with the Circuit Court that the second contract which provided for a rate less than that fixed by the Commission was void. However, the carrier did not sue upon this illegal contract nor was it necessary for him to rely upon it to make out his case. He was clearly within the rule of law announced by the Supreme Court of Texas in *Beer v. Landman*, 88 Tex. 450, as follows:

> "The plaintiff cannot recover when it is necessary for him to prove, as a part of his cause of action, his own illegal contract, or other illegal transaction; but if he can show a complete cause of action without being obliged to prove his own illegal act, although such illegal act may incidentally appear, and may be important even as explanatory of other facts in the case, he may recover."

Likewise, in the case of *Morrison v. City of Fort Worth*, 155 SWR (2nd) 908, the Supreme Court said:

> "In order to establish her cause of action the plaintiff requires no aid from the illegal contract. Under such a record, the illegal contract constitutes no bar to the plaintiff's cause of action. This is because of the settled rule in this State that, even though a demand is in some way connected with an illegal transaction, still recovery may be had if the plaintiff requires no aid from the illegal transaction to establish his case. Oliphant v. Markham, 79 Tex. 543, 15 S. W. 569, 23 Am. St. Rep. 363; Beer v. Landman, 88 Tex. 450, 31 S. W. 805; Hall v. Edwards, Tex. Com. App., 222 S. W. 167."

In support of this pari delicto doctrine the Circuit Court stated that the Federal Law applicable to this case had been announced in the case of *Congress & Empire Spring Company v. Knowlton*, 103 U. S. 49. An examination of this case will disclose (1) that it was not a rate case, but one concerning the increase of the capital stock of a corporation which the defendants in error conceded that the plan adopted by the

company to increase such stock was in violation of the law of the State of New York, and (2) that the plaintiff was required to rely upon the illegal transaction to make out his case. Therefore, it has no application to the case at bar.

For authority in Texas the Circuit Court relied solely upon *Wright v. Wight & Wight*, 229 SWR 881, which was not a rate case, in which the court announced the same rule as in the Beer v. Landman case and Morrison case, above, but denied recovery to the plaintiff because the plaintiff was compelled to depend upon the illegal contract to make out his cause of action, while in the instant case, the carrier does not depend upon nor does he seek the aid of the illegal contract to make out his case.

The position of the shipper in this case is analagous to that of the plaintiff in the case of *Central Freight Lines, Inc., v. C & S Motor Freight Lines*, 125 SWR (2nd) 615. In that case negotiations between two carriers resulted in two contracts, the first of which was submitted to and approved by the Commission. Then a second contract was entered into between the parties which was not submitted to nor approved by the Commission. In construing same the court said:

> "The use of public highways for the transportation of freight for hire by motor vehicle is a matter affected with a public interest, and the Legislature, in recognition thereof, has conferred on the Railroad Commission of the State the exclusive authority in the first instance to grant, withhold or modify permits to use the roads. The Legislature has also conferred on the Railroad

Commission authority to approve the sale and transfer of such permits and has provided that no such sale or transfer shall be valid without the approval of the Railroad Commission." * * *

"The private agreement between appellant and appellee to the effect that the purchaser of said certificates should restrict the service to be rendered the public at certain points on said route was not presented to nor approved by the Commission and therefore never became binding on it. It would be a violation of both the letter and spirit of the statute above cited to permit parties by private agreement, unapproved by the Railroad Commission, to restrict the service to be rendered the public under such certificates of convenience and necessity so issued by the Railroad Commission and to enforce such agreements in the district court without joining the Commission as a party thereto, as was done in this case. It would result in stripping the Railroad Commission of its right to regulate traffic on the highways and would take from it the authority to provide for the convenience of the public in the transportation of freight. The trial court, in an independent suit to which the Commission was not a party, had no right to interfere with appellant's operations so long as they were in compliance with said certificates. See, in this connection, Texas & N. O. Ry. Co. v. Greer, Tex. Civ. App., 117 S. W. 2d 148, par. 7."

With further reference to the second contract the Circuit Court in its opinion stated:

"There was but one contract that spoke the actual intent and agreement of the parties, and

that was the amended contract under which all of the services were performed.

"We also think that the inserted provision for the payment of such rates as the Commission should fix was a mere subterfuge that was never a part of the real agreement, intent, or purpose of the parties."

No issue on the intent of the parties was requested nor passed upon by the trial court, and thus the conclusion by the Circuit Court relating thereto was an independent finding which it was without jurisdiction to find. *Seely Oil & Gas Co. v. Railroad Commission*, 128 Fed. (2nd) 334. However, such a finding by the Circuit Court is wholly immaterial because the good faith or the bad faith of the parties in entering into this second contract cannot change the legally prescribed freight rate of the Railroad Commission of Texas. *T. C. Ry. Co. v. Kerns*, 108 SWR 187; *Texas & N. O. Ry. Co. v. Yates*, 161 SWR (2nd) 1050; *Herrin Transportation Company v. Marmion*, 113 SWR (2nd) 291; *P. C. C. & S. L. R. R. v. Fink*, 250 U. S. 577, 63 L. Ed. 1151.

PUBLIC POLICY

The Attorney General of Texas filed an able brief in this court in support of the carrier's (petitioner) application for a Writ of Certiorari. In his brief the Attorney General carefully analyzed and pointed out the great importance of this question of public policy as it affects the State of Texas, and we respectfully invite the court's attention to his brief. Since the At-

torney General has so ably and completely covered this subject we shall not burden this court with a further discussion of the subject. However, we pause to observe that if the decision of the majority opinion of the Circuit Court should be allowed to stand then all shippers in the State of Texas, whether they be contract or common carrier, could evade the payment of the rates prescribed by the Railroad Commission by the simple device of entering into a private contract with the carrier as was done in the instant case, and thus the whole rate structure of the State of Texas could be destroyed. By the simple device of violating the law the carrier and the shipper could place themselves beyond the pale of the law—thus becoming a law unto themselves. Such a situation is incomprehensible.

The majority opinion of the Circuit Court completely failed to take this important subject of public policy into consideration, but rested the decision entirely upon the pari delicto rule. The opinion stated:

> "We agree with Appellee (carrier) that the supplemental contract to pay rates less than those provided by the Railroad Commission was void, but we think that even so, the judgment should have been against him."

Such a pronouncement is another way of saying that pari delicto prevents the carrier from collecting the rates fixed by the Commission, and it is another way of saying that the shipper can escape paying the rates fixed by the Commission, simply because it entered into what the court termed a "void contract."

By this decision the Circuit Court fixed the rate by placing its stamp of approval on the "void contract," and which is void only because it violates the state statutes and public policy. Art. 1690B, *Vernon's Penal Code.*

How different this holding is from the uniform holdings of the Texas Courts as illustrated in *Railroad Commission v. Uvalde Construction Co. et al*, 49 SWR (2nd) 1113, where it is said:

> "* * * under the facts and circumstances it amounted to a definite fixation by the court of that rate. * * *"
>
> "If the carrier were authorized to initiate rates or to fix same by contract with shippers, clearly the court could properly impose such a condition, precedent to granting the injunctive relief sought. But no such power obtains in this state. Here the Railroad Commission itself fixes the rate, and that rate is conclusively presumed to be reasonable, just, and not discriminatory, until declared otherwise by a court of competent jurisdiction. If the trial court could, pending a final hearing on the merits, enjoin the carrier from collecting, and the commission from enforcing, any rate higher than that found by the court to be reasonable, we see no good reason why such could not, upon such final hearing, if it be found that the rate attacked was unlawful, make such temporary injunction permanent. To permit this would lead to chaos, and virtually transfer rate-making power from the commission to the courts."

The decisions on this subject by this court, all inferior federal courts, the Texas courts, and as far as

we can find, all other state courts, and all courts in the entire English speaking world are contrary to the majority opinion of the Circuit Court.

Judge Joseph C. Hutcheson, Jr., wrote a strong dissenting opinion. It will be remembered that Judge Hutcheson was a Texas lawyer who served for many years on the United States District Court and with nearly a quarter century of service on the Fifth Circuit. In his dissenting opinion Judge Hutcheson said:

> "I cannot agree that appellee (appellant) may in law be allowed to have the service performed without paying the statutory rate it agreed, and the law compelled it to pay. I think it clear that the district judge was right in the view he took, that the authorities in Texas leave in no doubt that rates prescribed by the Texas Railroad Commission are the only proper rates which may be charged and that a cause of action arises out of the statute in favor of any person who performs the service for which the rates are prescribed. The Railroad Commission's general order of 1931, therefore, prescribing common carrier rates as minimum rates was applicable to Steele's permit and was valid and enforceable. The supplemental contract for a less rate which was never approved by the Commission was not a valid contract of carriage, and though the parties acted, and payments were made, under it, this constitutes no defense to an action for the statutory rate. Herrin v. Marmion, 113 SW (2d) 291; Pittsburgh v. Fink, 250 U. S. 577. On the authority of Texas cases which apply the same doctrine to insurance rates that they do to carrier rates, we held in Bowen Motor Coaches v. N. Y. Casualty Co., 139

F. (2d) 332, that no contract could change the statutory rates and that they must be collected. To the suggestion made there that because the parties were in pari delicto in making an unlawful contract, plaintiff could not recover, we said, 'There was here no corrupt agreement to violate the law. No crime was to be committed.' In Battles v. Braniff, 146 F. (2d) 338, we held that no matter how illegal an agreement, to pay a less premium than the statute, was, or how illegally it was entered into, it would be ineffective to prevent recovery in a suit on the policy for the premiums the law fixed as due.

"I cannot, therefore, agree with the view of my associates, that the appellee (appellant) should be permitted to have its freight hauled for a less charge than others were under the law compelled to pay, and appellant because in pari delicto with appellee, may not recover. * * *

"But if I could agree that there was a deliberate intent to defraud the statute, I still could not agree with the majority, whether plaintiff's suit is to be regarded as on the written contract which was exhibited to and filed with the Commission, or on the right arising out of the statute to recover the legal charges for the services rendered, for the right to recover the legal charges and no other rests on an overriding public policy. This policy is so imperative that it may not be defeated by the conduct of the parties in entering into illegal and evasive arrangement which it is the very purpose of the policy to strike down."

In the majority opinion of the Circuit Court, we find the following statements:

"The statute here does not expressly authorize

a suit for the recovery of the prescribed rates by anyone."

This pronouncement is equally as strange and foreign to our Texas Law. As we analyze it, it is another way of applying the pari delicto rule. The carrier in the instant case based his cause of action upon the first written contract, that provided he would receive, and that the shipper would pay, the rates fixed by the Commission and upon the statutory liability of the shipper to pay the legal rate as fixed by the Commission.

The carrier simply prosecuted this suit as provided in subdivision 1 of Article 5527, R. C. S. of Texas, same being an "action for debt" as announced in the case of *Texarkana & W. S. Ry. Co. v. Houston Gas & Fuel Co.*, 51 SWR (2nd) 284-86.

The Texas Statute relating to motor carriers "does not expressly authorize a suit for the recovery of the prescribed rates by any one." Yet, in the case of *Herrin Transportation Company v. Marmion*, 113 SWR (2nd) 291, the motor carrier had a private contract with the shipper which provided for a rate different from that as fixed by the Commission. The court held that such contract was void and that the only rate that could apply was the rate fixed by the Commission. The carrier was allowed to recover the rate fixed by the Commission.

The Texas statute relating to railroads "does not expressly authorize a suit for the recovery of the prescribed rates by any one." We refer to the cases above cited: *Railroad Commission v. Weld & Neville*, 73 SWR 532; *Texas & N. O. Ry. Co. v. Yates, et al*, 161

SWR (2nd) 1050; and *H. & T. C. R. Company v. Johnson*, 41 SWR (2nd) 14.

The Insurance Statute of Texas "does not expressly authorize a suit for the recovery of the prescribed rates by any one"; etc., yet, in the case of *Brown & Root v. Traders & General Insurance Co.*, 135 SWR (2nd) 534, the insurance company was allowed to recover from the insured the rates fixed by the insurance Commissioner. The court said:

> "They are without power by contract, or otherwise, to alter such prescribed rate. * * * In other words, if a carrier of workmen's compensation, for instance, had collected a lower permium rate than was lawfully prescribed for carrying the risk involved, and later discovered such error, it would certainly not have to prove that it was not negligent in collecting the unlawful rate, in order to entitle it to collect the only rate which the law authorized or permitted it to collect."

Therefore, we conclude Section One of this Brief. We respectfully submit that under the authorities above cited the Circuit Court of Appeals erred in reversing the trial court on the one issue of pari delicto. We further submit that the judgment of the Circuit Court of Appeals should be reversed and that of the trial court affirmed, with costs adjudged against the respondent.

SECTION TWO

(Relating to Immaterial Issues)

The respondent filed a brief in reply to the petitioner's Application for a Writ of Certiorari in which it attempted to raise immaterial issues that were not passed upon by the Circuit Court of Appeals and not material to a determination of this case. Therefore, we shall attempt to cite the authorities that make the position of the respondent untenable, even on such immaterial issues.

SHIPPER A FOREIGN CORPORATION

The shipper in this case is a Delaware corporation with a permit to do business in Texas, and when it came into Texas it was charged with a knowledge of Texas laws, and like all other citizens—natural or artificial—it must obey such laws. When this shipper entered into the original contract with the carrier such contract became the very foundation for all subsequent negotiations. It was the basis of the application addressed to the Commission for a permit to operate over the Texas highways as a contract carrier. When the shipper sent its traffic manager to Austin to testify under oath before the Commission, and, in this manner to advise the Commission of the shipper's needs and requirements and of the nature of the proposed operation as contemplated by the written contract, the shipper became as much a party to the proceedings as the carrier himself. The shipper voluntarily came to Texas. The shipper voluntarily invoked the jurisdic-

tion of the Railroad Commission when it voluntarily entered into the contract with the carrier which provided:

> "It is mutually agreed between the parties that the rate to be charged by the first party and paid by the second party for the services contemplated to be rendered as provided in this contract shall be such rates, charges or tariffs as may be fixed by the Railroad Commission of the State of Texas, and in conformity with the rules and regulations now in existence or that may hereafter be promulgated by said Commission for the kind and character of service to be rendered hereunder."

This Court in *Pierce Oil Corp. v. Phoenix Refining Co.*, 259 U. S. page 125, 66 L. Ed. 855, stated the rule:

> "This Constitution and these laws had been in effect for five years when the Pierce Company, by applying for and obtaining the privilege of conducting its business operations within the state, elected to respect and obey them. * * *
>
> "When the large discretion which the state had to impose terms upon this foreign corporation as a condition of permitting it to engage in wholly intrastate business is considered (National Council v. State Council, 203 U. S. 151, 163; 51 L. ed. 132, 137, 27 Sup. Ct. Rep. 46; Pullman Co. v. Kansas, 216 U. S. 56, 66, 54 L. ed. 378, 385, 30 Sup. Ct. Rep. 232; Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 83, 58 L. ed. 127, 133, 34 Sup. Ct. Rep. 15), the contention that this order of a tribunal to the jurisdiction of which the company voluntarily submitted itself, made after notice and upon full hearing, deprives it of its property without due process of law, must be pronounced

futile to the point almost of being frivolous. *'By accepting the privilege it voluntarily consented to be bound by the conditions' attached to it* (216 U. S. 56, 66); *and, while enjoying the benefits of that privilege, it will not be heard to complain that an order, plainly within the scope of statutes in effect when it entered the state, is unconstitutional.*" (Emphasis ours.)

The shipper enjoyed every benefit that the State of Texas could grant for a contract carrier operation. Its commodities were transported over Texas highways. Yet, it does not want to pay the freight rates fixed by the State Legislature and the Railroad Commission for such transportation.

There was no discrimination because every other shipper and carrier operating in Texas is subject to same regulations to the class of which they may be members.

Having agreed to pay the rate fixed by the Railroad Commission, the shipper cannot now be heard to say that it could not fix a rate or did not fix it in accordance with law. Even if it had not agreed to pay the rate fixed by the Commission, when it agreed for the proposed carrier to apply to the Commission for authority to haul its commodities over Texas highways, it could not "while enjoying the benefits of that privilege" be heard to complain that the order fixing the rates it must pay was unconstitutional or not supported by adequate findings of fact.

In the case of *United Fuel Gas Co. v. Railroad Commission*, 278 U. S. 300, 73 L. Ed. 390, Judge Stone said:

"The present appeal challenges the constitutionality of the order of the commission, as construed by the court, under the 14th Amendment of the Federal Constitution, both because the rate is confiscatory and because the order, which under the Kentucky statutes is not subject to judicial review, *was not supported by findings of the commission.*" * * *

"But this objection, and that as well to the constitutionality, on state grounds, of the statute creating the commission and defining its powers, are not available to appellants in the present suit. It is the rule of this court, consistently applied, that one who has invoked action by state courts or authorities under state statutes may not later, when dissatisfied with the results, assail their action on the theory that the statutes under which the action was taken offend against the Consitution of the United States (citing cases). Upon like principle, we think that appellants, who have procured action by a state commission under a state statute, may not assail that action in a federal court of equity on the ground that that statute, or the one creating the commission, is void under the state Constitution. Cf. Shepard v. Barron, 194 U. S. 553, 48 L. ed. 1115, 24 Sup. Ct. Rep. 737. The sound discretion which controls the exercise of the extraordinary powers of a federal court of equity should not permit them to be exerted to relieve suitors on such a ground from the very action of state authorities which they have invoked."

On pages 46 and 47 of the shipper's brief, opposing carrier's application for a writ of certiorari in this court, we find the following admissions:

"The validity or constitutionality of the Texas

Motor Carrier Act as a whole, or any part thereof, is not here attacked, except and unless a construction be placed upon Section 6-aa thereof obviously different from the intended meaning of the Legislature of Texas.

"The legality of the act of the Commission in issuing a permit to petitioner (except insofar as it is claimed that such permit fixes minimum rates to be charged) is not here questioned. It is conceded that a permit is required under the Act by every motor carrier for hire, whether common carrier or private carrier. It is also conceded that the purpose of the Act under which the permit was granted was to protect the safety and convenience of the public in the use of the highways and to preserve the highways for the general welfare, and to protect common carriers against destructive, unfair and discriminatory competition by other motor carriers in the use of the highways.

"To this end it was proper that the Commission require petitioner to apply for and obtain a permit, post a bond, not overload, and otherwise comply with the rules and regulations of the Commission designed to protect the public welfare. It is also conceded that had petitioner's operations been in competition with the operations of common carriers over the highways of the state, and had petitioner performed substantially the same services as common carriers, and had the Commission so found, the Commission could have fixed minimum rates to be observed by petitioner in order to protect the interests of common carriers."

This Court in *Stephenson v. Binford*, 287 U. S. 251, 77 L. Ed. 288, stated:

> "Here the circumstance which justifies what otherwise might be an unconstitutional interference with the freedom of private contract is that the contract calls for a service, the performance of which contemplates the use of facilities belonging to the state; *and it would be strange doctrine which, while recognizing the power of the state to regulate the use itself, would deny its power to regulate the contract so far as it contemplates the use.* 'Contracts which relate to the use of the highways must be deemed to have been made in contemplation of the regulatory authority of the State.' Sproles v. Binford, supra (286 U. S. at pp. 390, 391, 76 L. ed. 1180, 1181, 52 S. Ct. 581), and authorities cited." (Emphasis ours.)

We respectfully submit that the Legislature said nothing at all about the Commission entering findings of fact with reference to Section 6aa. The only requirement concerning findings by the Commission is found in Article 911b, Section 12, which reads:

> "In any contested hearing, the Commission shall, along with its order, file a concise written opinion setting forth the facts and grounds for its action, and such opinion shall be admissible in evidence on any appeal taken therefrom."

It required five printed pages to cover the findings of the Commission in the instant case, Record page 124 through 129. In this finding or order of the Commission we find the following significant statement:

> "The Commission, after carefully considering the evidence, the laws, and its own rules and regulations, is of the opinion that the character of business proposed to be done by the appellant

> strictly conforms with the definition of a contract carrier; * * * In connection with the rates, the Commission directs attention to its tariffs and orders prescribed as a minimum rate to be charged by contract carriers the rates prescribed for common carrier motor carriers."

What more could be required of the Commission than to have it carefully consider "the evidence the laws and its own rules and regulations"? Then, after considering the same, the Commission "is of the opinion that the character of business proposed to be done by the applicant strictly conforms with the definition of a contract carrier." Remember, also, that the parties to the application, Steele and General Mills, Inc., had agreed to pay the rates prescribed by the Commission. (R. 87-93.)

In *Victory Trunk Line, Inc., et al v. Red Arrow Freight Lines, Inc., et al*, 186 SWR (2nd) 98, the court said:

> "* * * and as to such contract carriers, the Railroad Commission having granted the permit, it will be presumed, absent any evidence to the contrary, that the Commission discharged the duties imposed upon it by law. At any rate, in their attack upon the order, the burden rested upon the appellees to prove the contrary. This they failed to do."

By its order or findings of fact (R. 124-129) and by issuing the certificate (R. 130) the Commission made applicable its General Order No. 25 which was issued by the Commission August 22, 1931, and the order of the Commission, amending the same, which

was known as Motor Freight Class and Commodity Tariff No. 1-A effective July 26, 1940. (R. 136.) The Commission in this manner said to the shipper "you must pay" and to the carrier "you must collect" the tariff as prescribed in General Order No. 25 as contained in Motor Class and Commodity Tariff No. 1-A. The Commission thereupon made such order a specific order for this particular operation.

The arguments by the shipper that it can successfully evade and defeat the tariff rates of the Commission because of its own interpretation of fact findings relating to Article 6aa, "must be pronounced futile to the point of being almost frivolous," *Pierce Oil Corp. v. Phoenix Refining Co.*, 259 U. S. 125, 66 L. Ed. 855. Such argument finds its complete answer in the language of this court in the case of *Pacific States Box & Basket Co. v. White, et al*, 296 U. S. 176, 80 L. Ed. 138, as follows:

> "The contention is without support in authority or reason, and rests upon misconception."

The Court further said:

> "The order here in question deals with a subject clearly within the scope of the police power See Turner v. Maryland, 107 U. S. 38, 27 L. ed. 370, 2 S. Ct. 44. When such legislative action 'is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that

the action is arbitrary.' Borden's Farm Products Co. v. Baldwin, 293 U. S. 194, 209, 79 L. ed. 281, 288, 55 S. Ct. 187. The burden is not sustained by making allegations which are merely the general conclusions of law or fact. See Public Serv. Commission v. Great Northern Utilities Co., 289 U. S. 130, 136, 137, 77 L. ed. 1080, 1085, 1086, 53 S. Ct. 546. Facts relied upon to rebut the presumption of constitutionality must be specifically set forth. See Aetna Ins. Co. v. Hyde, 275 U. S. 440, 72 L. ed. 357, 48 S. Ct. 174; O'Gorman & Young v. Hartford F. Ins. Co., 282 U. S. 251, 75 L. ed. 324, 51 S. Ct. 130, 72 A. L. R. 1163; Hegeman Farms Corp. v. Baldwin, 293 U. S. 163, 79 L. ed. 259, 55 S. Ct. 7." * * *

"Every exertion of the police power, either by the legislature or by an administrative body, is an exercise of delegated power. Where it is by a statute, the legislature has acted under power delegated to it through the Constitution. Where the regulation is by an order of an administrative body, that body acts under a delegation from the legislature. The question of law may, of course, always be raised whether the legislature had power to delegate the authority exercised. Compare Panama Ref. Co. v. Ryan, 293 U. S. 388, 79 L. ed. 446, 55 S. Ct. 241; and A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495, 79 L. ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947. But where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies. Compare Aetna Ins. Co. v. Hyde, 275 U. S. 440, 447, 72 L. ed. 357, 364, 48 S. Ct. 174."

Mr. Justice Brandeis speaking for this court in the case of *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 80 L. Ed. 1033-1058, said:

> "Whenever a legislative body regulates a subject within the scope of its power, a presumption of constitutionality prevails, in the absence of some factual foundation of record for overthrowing the regulation, O'Gorman & Young v. Hartford F. Ins. Co., 282 U. S. 251, 257, 258; 75 L. ed. 324, 327, 328, 51 S. Ct. 130, 72 A. L. R. 1163, and this rule extends to such action by an administrative body. Pacific States Box & Basket Co. v. White, 296 U. S. 176, 185, 186, ante, 138, 56 S. Ct. 159, 101 A. L. R. 853." * * *
>
> "But supremacy of law does not demand that the correctness of every finding of fact to which the rule of law is to be applied shall be subject to review by a court. If it did, the power of courts to set aside findings of fact by an administrative tribunal would be broader than their power to set aside a jury's verdict. The Constitution contains no such command."

We invite the court's attention to the holdings of the Texas Courts on this point. *Texas Employers' Ins. Ass'n. v. Ezell*, 14 SWR (2nd) 1018:

> "Where one invokes the jurisdiction of a court and recovers judgment in accordance therewith, he will not be heard thereafter to say such court had no jurisdiction and that its award to him was therefore void. Such course is condemned by the highest considerations of public policy. He is estopped to make such plea, * * *."

Spence v. State National Bank, 5 SWR (2nd) 754:

> "Undoubtedly having general jurisdiction over the subject-matter, a failure to observe the requirements of the statute in the particular question under consideration is procedural, and at most would only render the judgment voidable upon a direct attack."

Security Trust Co. of Austin v. Lipscomb County, 180 SWR (2nd) 151:

> "Upon collateral attack the validity of a judgment cannot be determined except by the record. Stockyards Nat. Bank v. Presnall, 109 Tex. 32, 194 S. W. 384. Unless the record negatives the existence of facts that are essential to the court's jurisdiction, the law conclusively presumes upon collateral attack that those facts were established by the evidence. Crawford v. McDonald, 88 Tex. 626, 630-632, 33 S. W. 325; Templeton v. Ferguson, 89 Tex. 47, 33 S. W. 329; Moore v. Hanscom, 101 Tex. 293, 106 S. W. 876, 108 S. W. 150; Carrol v. McLeod, 133 Tex. 571, 577, 103 S. W. 2d 277." * * *
>
> "Accordingly, the invalidity of the contracts is not shown by the record in that case, and, this being true, it is conclusively presumed that the court found that the contracts were valid." * * *
>
> "The fault in this position is that it assumes that jurisdiction of a court depends, not upon the character of the case, but upon the court's action in deciding it. As said in Commonwealth of Massachusetts v. Davis, 150 Tex. 398, 405, 168 S. W. 2d 216, 220, the court 'had authority to decide this question either rightly or wrongly.' See also Moore v. Blagge, 91 Tex. 151, 1611, 38 S.

W. 970; Swift & Co. v. United States, 276 U. S. 311, 330, 48 S. Ct. 311, 72 L. Ed. 587, 599. We hold, for the reasons given, that the orders approving the contracts were not void."

STANDARDS FIXED BY LEGISLATURE

In the caption of H. B. 335, which is Article 911b, Sections 1 to 22, V. A. C. S., of the Forty-second Legislature, one finds the following significant language:

> "An Act to amend Chapter 314, General Laws of the State of Texas, Forty-first Legislature, * * * providing that no motor carrier shall hereafter operate as a common carrier without having a certificate of convenience and necessity and that no motor carrier shall hereafter operate as a contract carrier without having a permit; giving to the Railroad Commission of the State of Texas power and imposing upon it the duty to fix, prescribe or approve maximum or minimum or maximum and minimum rates, fares and charges for motor carriers doing business as common carriers and minimum rates, fares and charges for motor carriers operating as contract carriers."

An examination of Article 911b, Sec. 6aa, will disclose (1) that the Legislature of Texas, by the enactment of that section, found that a contract carrier would be in competition with common carriers, and (2) it found that the services to be rendered would be substantially the same service as common carriers.

> "Sec. 6aa. The Commission is hereby vested with power and authority and it is hereby made its duty to prescribe rules and regulations covering the operation of contract carriers in competi-

> tion with common carriers over the highways of this State and the Commission shall prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service."

It must be presumed that the Legislature had before it and took into consideration all of the facts necessary and essential to the enactment of the law. *Pacific States Box* case by this court, 296 U. S. 176, 80 L. Ed. 138, and for Texas cases see *State v. Lone Star Gas Co.*, 129 SWR (2nd) 1164. Also *Railroad Commission v. Rapid Transit Co.*, 92 SWR (2nd) 261, and we quote from the opinion in the latter case as follows:

> "The order was one which the commission had authority to make and was therefore presumptively valid. The burden was upon appellees to show that this finding of the commission had no reasonable factual basis for its support. This burden was not met, and the trial court therefore erred in setting aside the order. The law upon this question is now so thoroughly settled as to require only a reference to the leading cases thereon. Railroad Commission v. Shupee (Tex. Civ. App.), 57 S. W. (2d) 295, affirmed 123 Tex. 521, 73 S. W. (2d) 505; Railroad Commission v. Winkle (Tex. Civ. App.), 57 S. W. (2d) 287; Texas Motor Coaches v. Railroad Commission (Tex. Civ. App.), 59 S. W. (2d) 923; affirmed 123 Tex. 517, 73 S. W. (2d) 511; Railroad Commission v. George A. Scott Truck Line (Tex. Civ. App.), 57 S. W. (2d) 293; Railroad Commission v. Inter-City F. Co. (Tex. Civ. App.), 57 S. W. (2d) 290; Railroad Commission v. Winkle (Tex. Civ. App.),

57 S. W. (2d) 287; Railroad Commission v. McDonald (Tex. Civ. App.), 90 S. W. (2d) 581."

When the Legislature enacted the Statute which requires contract carriers to charge as high rates as competitive common carriers rendering substantially the same service, it did not have in mind the quality or standard of service to be performed as between the carriers. Obviously, one carrier may have more modern and more commodious equipment, and render more rapid and more efficient service than the other. The difference in personnel and the little details of service offered by one may mark him as rendering an outstanding service to his shippers far above what his competitor, common or contract, may render. But the basic and fundamental fact remains that insofar as they haul commodities for hire over the same highways in trucks and between common points they are in competition. This is a matter of common knowledge. And insofar as they haul the same class of commodities the same distance over the same highways they are rendering substantially the same service and the act recognizing these facts of common knowledge requires that there shall be no discriminatory minimum rates under such circumstances. One must not be less than the other. So says the Texas statute.

The Legislature did not leave the determination of these basic and fundamental facts to the Railroad Commission or the courts. It decided for itself that under such circumstances common carriers and contract carriers were in competition and were rendering

substantially the same service, and should collect the same minimum tariff.

The function of the Commission is to classify commodities for rate purposes by means of its own choosing. Whether one rate or the other is to be charged is determined by a proper classification of the cargo. If a contract carrier and a common carrier are hauling the same class of commodities the same distance over the same routes, they are, as a matter of law, under the act, in competition and are rendering substantially the same service and contract carriers must collect as minimum the same rates. Neither the Commission nor the courts has any jurisdiction to hear evidence and determine whether this is true.

Therefore, it makes no difference whether the Commission failed to find specifically that such facts existed or even failed to hear evidence on the question. Its function ceased when it provided, as it did in this case, the schedules of rates for the various classes of commodities and said common carriers transporting them for hire must charge the rates povided in the tariff schedule for each class of commodities hauled and that contract carriers must charge the same rates as minimum.

It follows without argument that the trial court could not hear and determine these basic and fundamental questions for itself, and, the answers of the jury, to the questions submitted, are immaterial. Likewise, the defense that the tariff rates do not apply and cannot be collected because the contract carrier in this

case was not in competition with and not rendering substantially the same services as common motor freight carriers cannot be maintained because the Legislature foreclosed that issue.

Mr. Chief Justice Alexander of the Supreme Court of Texas in discussing the question of findings by an administrative agency in the case of *Railroad Commission et al v. Shell Oil Company, Inc., et al*, 161 SWR (2nd) 1022-1030, said:

> "In Texas, in all trials contesting the validity of an order, rule, or regulation of an administrative agency, the trial is not for the purpose of determining whether the agency actually heard sufficient evidence to support its orders, but whether at the time such order was entered by the agency there then existed sufficient facts to justify the same."

The Chief Justice writing in another case, decided on the same day, in discussion the subject in *Cook Drilling Company v. Gulf Oil Corporation*, 161 SWR (2nd) 1035, said:

> "As is well known, hearings before the Commission are informal. In the vast majority of instances its orders are not contested. It would be placing a useless and intolerable burden on the Commission to require it to make an 'appeal-proof' record in every instance. The rights of the parties will be fully protected if, upon a contest of the order in the district court, the parties are given full opportunity to show that at the time the order was entered there did, or did not, then exist sufficient facts to justify the entry of the same."

An interesting case on this subject decided by this court and involving the Texas Railroad Commission is that of *Thompson v. Consolidated Gas Utilities Corp.*, 300 U. S. 55, 81 L. Ed. 510:

> "It is settled that to all administrative regulations purporting to be made under authority legally delegated, there attaches a presumption of the evistence of facts justifying the specific exercise. Pacific States Box & Basket Co. v. White, 296 U. S. 176, 185, 80 L. ed. 138, 146, 56 S. Ct. 159, 101 A. L. R. 853."

In the language of this court in the case of *United States v. Berwind-White Coal Min. Co.*, 274 U. S. 564, 71 L. Ed. 1205-1217:

> "The contention that findings of the Commission concerning discrimination were unsupported by evidence, or that findings essential to the order are lacking, rests largely upon a misconception." * * *
>
> "The argument overlooks the difference in the character between a general rule prescribed under and a practice for particular carriers ordered or prohibited under Secs. 1, 3 and 15 of the Interstate Commerce Act. In the cases cited, the Commission was determining the relative rights of the several carriers in a joint rate. It was making a partition; and it performed a function quasi judicial in its nature. In the case at bar, the function exercised by the Commission is wholly legislative. Its authority to lgeislate is limited to establishing a reasonable rule. But in establishing a rule of general application, it is not a condition of its validity that there be adduced evidence of

its appropriateness in respect to every railroad to which it will be applicable. In this connection, the Commission, like other legislators, may reason from the particular to the general."

This court has already approved the standards fixed by the Texas Legislature to govern the Commission in its promulgation of rates for contract carriers under Section 6aa in the case of *Stephenson v. Binford*, 287 U. S. 251, 77 L. Ed. 288:

"What has just been said applies in the main to the other challenged provision authorizing the commission to prescribe minimum rates not less than those prescribed for common carriers for substantially the same service. This provision, by precluding the contract carriers from rendering service at rates under those charged by the railroad carriers, has a definite tendency to relieve the highways by diverting traffic from them to the railroads. The authority is limited to the fixing of minimum rates. The contract carrier may not charge less than the rates so fixed, but is left free to charge as much more as he sees fit and can obtain. Undoubtedly, this interferes with the freedom of the parties to contract, but it is not such an interference as the Fourteenth Amendment forbids. While freedom of contract is the general rule, it is nevertheless not absolute but subject to a great variety of legitimate restraints, among which are such as are required for the safety and welfare of the state and its inhabitants (citing cases). * * *

"We need not consider whether the act in some other aspect would be good or bad. It is enough to support its validity that, plainly, one of its

aims is to conserve the highways. If the legislature had other or additional purposes, which, considered apart, it had no constitutional power to make effective, that would not have the result of making the act invalid. Ellis v. United States, 206 U. S. 246, 256, 51 L. ed. 1047, 1052, 27 S. Ct. 600, 11 Ann. Cas. 589. Nor does it matter that the legislation has the result of modifying or abrogating contracts already in effect. Such contracts are to be regarded as having been made subject to the future exercise of the constitutional power of the state."

See also *Railroad Commission v. Intercity Forwarding Company*, 57 S. W. (2nd) 290; *Britton v. Smith*, 82 S. W. (2nd) 1065.

COLLATERAL ATTACK AND APPEAL STATUTE

In the language of Mr. Chief Justice Stone in the case of *United Fuel Gas Co. v. Railroad Commission*, 278 U. S. 300, 73 L. ed. 391, the objections relating to findings of fact "are not available to appellants (shipper) in the present suit," for the reason that the rate orders of the Commission (R. 133-137), the order of the Commission authorizing the operation (R. 124) and the Permit issued by the Commission (R. 130) are regular on their face and therefore the defense as urged is a collateral attack. This case was tried in the United States District Court at Fort Worth by reason of diversity of citizenship and any attack on the orders of the Commission would be a collateral attack. Section 20, Article 911b, provides in part:

"If any motor carrier or other party at interest be dissatisfied with any decision, rate, charge, rule, order, act, or regulation adopted by the Commission, such dissatisfied person, association, corporation, or party after failing to get relief from the Commission may file a petition setting forth the particular objection to such decision, rate, charge, rule, order, act or regulations, or to either or all of them in the District Court in Travis County, Texas, against said Commission as defendant, etc."

The record in this case is clear that the shipper did not attempt "to get relief from the Commission" (R. 244-5), as provided by the Texas Statute. See *Greer v. Railroad Commission*, 117 S. W. (2nd) 142-145, as follows:

"The legislature has provided ample means to protect those aggrieved by 'any decisions, rate, charge, rule, order, act or regulation adopted by the Commission,' through resort to the courts by direct appeal. Art. 911b, Sec. 20. Such right of appeal, however, is granted only 'after failing to get relief from the Commission.' This language in the section clearly indicates that the legislature had in mind that rules, etc., of the Commission might not operate fairly upon all motor carriers, and to determine such issues the Commission was most suitably circumstanced. Aggrieved parties were therefore required to seek relief from the Commission, before resort could be had to the courts. Mr. Mark Mashall, Chairman of the Motor Transport Division of the Commission, testified that it was the Commission's construction of the law that it was required to hear and determine applications for such relief, and that such proce-

dure would have been followed in Greer's case had he made the application. All other special commodity permit holders had acquiesced in the order in question.

"It is the rule in the Federal Supreme Court that relief against rules of administrative boards will not be granted until after it has been sought of and denied by such boards. Red 'C' Oil Mfg. Co. v. Board of Agriculture, 222 U. S. 380, 32 S. Ct. 152, 156, 56 L. ed. 240; Peterson Baking Co. v. Bryan, 290 U. S. 570, 54 S. Ct. 277, 78 L. ed. 505, 90 A. L. R. 1285. We quote from the former (Chief Justice White writing):

" 'We have not attempted to enumerate the objections urged against the rules and regulations adopted by the board of agriculture. The Court below was clearly right when it observed that if, as the complainant alleged, the standard of safety fixed by the board was unreasonably high, or the method of testing oil unsatisfactory, and not such as was in general use, or the regulations in other respects were unjust or oppressive, it should seek relief by applying to the board of agriculture to modify them.'

"This holding is in accord with the general doctrine that one aggrieved by the acts of administrative officials or boards must first exhaust his legal remedies before resort to the courts. See 37 Tex. Jur., p. 918, Sec. 54, from which the following: 'A petition which fails to allege that the plaintiff has resorted to the proper school authorities before appealing to the courts is insufficient to confer jurisdiction'."

It is not contended by the shipper that the rates

fixed by the Commission in this case have ever been brought in question as provided by Article 911b, Sec. 20, by direct appeal to a District Court in Travis County, Texas. The present case is not an appeal as provided by the statutes.

In construing this Statute our Texas Courts have uniformly held attacks upon the orders of the Railroad Commission must be filed in the District Court of Travis County in Austin, Texas. See *Alpha Petroleum Company v. Terrell*, 59 S. W. (2nd) 364, wherein the court said:

> "Under the plain terms of the above-quoted statute we are compelled to hold that any suit which seeks to annul, modify, or set aside any rule of the commission valid on its face, promulgated by authority of the terms of chapter 26, supra, sec. 15 (Vernon's Ann. Civ. St. art. 6029), must be brought in a district court of Travis County, Texas, and that this requirement is one of jurisdiction, and not a mere question of venue. We further hold that, if the rule is one utterly void on its face, it may be attacked in any court otherwise having jurisdiction of the case. We finally hold, however, that, if it requires evidence to show the invalidity of the rule, it is not void on its face, and is not subject to collateral attack or to attack in any court, except a district court of Travis County."

In the case of *Producers' Refining Co. v. Missouri, K. & T. R. Co. of Texas* (Com. of App.), 113 SWR (2d) 679, the court held:

> "The orders of the Railroad Commission are to

> be likened to the judgments of courts. While the commission is not a part of our judiciary system, nevertheless its duties are quasi judicial, and its functions, in many respects, are those of a court. Aransas Harbor, etc., Co. v. Taber (Tex. Com. App.), 235 S. W. 841; Railroad Commission of Texas v. San Antonio Compress Co. (Tex. Civ. App.), 264 S. W. 214, writ refused; M. K. & T. Ry. Co. v. State (Tex. Civ. App.), 275 S. W. 673. Whether it be treated as a tribunal of general or limited jurisdiction, the sanctity of its orders is the same. All of our courts are courts of limited jurisdiction, but, once they hear and determine a matter within their jurisdiction, the judgment becomes final as against all collateral attacks."

Chief Justice Cureton, speaking for the Supreme Court in *Mingus v. Wadley*, 285 S. W. 1084, stated the rule as follows:

> "In special proceedings not within the common-law jurisdiction, the court's statutory designation of the venue is mandatory and jurisdictional."

As pointed out above, five printed pages in the record were required to print the findings of the Commission in this case. Yet, the shipper complains that additional findings were necessary before the Commission can fix rates. However, the shipper went before the Commission, through its traffic manager, and so far as this record is concerned no request was made for such additional finding. The leading case in Texas on this question is *Texas Steel Company v. Fort Worth & Denver*, 40 S. W. (2nd) 78, wherein the contention

was made that the rate order of the Commission was made without notice:

"The steel company in effect contends that the railroads have been charging for intrastate shipments of steel rates promulgated by the Texas Railroad Commission, but that the orders of the Railroad Commission by authority of which such rates and charges have been made are utterly void, and therefore subject to collateral attack in a court other than a district court of Travis County, Texas." * * *

"It is the settled law of this state that the Railroad Commission is a quasi judicial body. Producers' Refining Co. et al. v. M. K. & T. Ry. Co. of Texas (Tex. Com. App.), 13 S. W. (2d) 679.

"Since the Railroad Commission is a quasi judicial body, it follows that an order regular upon its face, made by the commission, is not subject to collateral attack. Articles 6452, 6453 R. C. S. of Texas 1925; West Texas Compress Co. v. Railway Co. (Tex. Com. App.), 15 S. W. (2d) 558; Producers' Refining Co. v. M. K. & T. Ry. Co., 13 S. W. (2d) 679; Id. (Tex. Com. App.), 13 S. W. (2d) 680; Railroad Commission v. Weld, 95 Tex. 278, 66 S. W. 1095; M. K. & T. Ry. Co. of Texas v. Railroad Commission (Tex. Civ. App.), 3 S. W. (2d) 489; Empire Gas & Fuel Co. v. E. L. Noble et al. (Tex. Com. App.), 36 S. W. (2d) 451." * * *

"We think that a casual reading of the certificate will demonstrate that the orders of the commission here attacked as null and void are regular on their faces. All the grounds urged to nullify such orders require the court to go behind them to ascertain the facts, and do not appear on the

face of such orders. It has long been settled in this state that such an attack is collateral.

"If an order of the commission regular on its face can be collaterally attacked on the ground of want of notice, or any other ground here urged, then the orders and rates of the commission could be rendered null and void in a proceeding in which the commission was never given an opportunity to be heard either on the facts or the law. Furthermore, different courts might reach conflicting conclusions as to the facts involved in the same order. This demonstrates the wisdom of the statute and the correctness of the rule here announced. The Legislature recognized in the beginning that to allow such attacks would lead to intolerable results, and foreclosed the right to do so by the statute prescribing the manner and the court in which the rules and rates of the commission can be subjected to judicial review. At this point we wish to state that we do not want to be understood as holding that we would hold these orders illegal in a direct proceeding. We do not pass on that matter, as we have no such proceeding here. What we do hold is that the orders here attacked are not subject to be called in question except in a direct proceeding brought in full conformity with the provisions of article 6453, supra."

This Court has had occasion to consider the appeal statutes concerning orders of the Texas Railroad Commission. *Burford v. Sun Oil Co.*, 319 U. S. page 315, 87 L. Ed. 1424, leaves no doubt that this Court has held that an appeal from the orders of the Railroad Commission must be in a District Court of Travis County, Texas, whether State or Federal. In this case

the defense urged by the shipper was an attack upon a rate order of the commission in the United States District Court at Fort Worth. Therefore, this defense could be nothing less than a collateral attack.

The Appeal Statute considered by this court in the Burford case above, relating to oil and gas and pertaining to venues and jurisdiction in Travis County, is almost identical with Section 20 of Article 911b above, which is under consideration in this case.

It therefore follows without argument that the defense urged by the shipper in the instance case was a collateral attack, and that such defense would not even be available on an appeal to a district court in Travis County because the shipper has not first sought relief from the Commission. Furthermore, by whatever name the shipper may designate this defense it can be nothing more than a collateral attack which is not available to a shipper in the United States District Court when the only basis of jurisdiction is that of diversity of citizenship.

STATUTE OF LIMITATION NOT APPLICABLE

The shipper in this case pleaded the Two Year Statute of Limitation which relates to contracts that are not in writing. Art. 5526. The trial court held that the Statute was not applicable. (R. 94 and 98.) The original contract between the carrier and the shipper was an instrument in writing which provided that the shipper would pay and the carrier collect the rates as prescribed by the Railroad Commission of Texas. Therefore, the only Statute of Limitation applicable

to this operation would be the Four Year Statute, Art. 5527. All of this operation was within a period of three years. This subject was discussed and the contention of the shipper in this case was foreclosed in the case of *Texarkana & S. Ry. Co. et al v. Houston Gas and Fuel Co.*, 51 SWR (2nd) 284, and the many cases cited therein which case went to the Supreme Court on the certified question as follows:

> "Did the four-year rather than the two-year statute of limitations apply to the appellee's cause of action for the refund sued for?"

Judge Critz held that the four-year statute of limitations was applicable and after citing many cases said:

> "We think it is equally as well settled as the law of this state that a suit for overcharges for freight shipped on a written bill of lading is a suit for debt within the meaning of subdivison 1 of article 5527, R. C. S. 1925. This proposition is grounded on the fact that the term 'actions for debt,' which are required by the above-cited article to be commenced within four years after the cause of action shall have accrued, include all suits brought to recover money for the breach of contract in writing without regard to the technical distinction between actions and suits, and debts and damages at common law. Robinson v. Varnell, 16 Tex. 382. See, also, authorities above cited."

CONCLUSION

For the reasons stated we respectfully submit that the pari delicto doctrine cannot be applied to defeat the legally established freight rates of the Texas Railroad Commission. That the public policy of the State of Texas, as pointed out in the brief of the Attorney General in this case, overrides private interests and requires that the legal rate fixed by the Texas Commission be applied in the instant case.

WHEREFORE, petitioner prays that the judgment of the Circuit Court of Appeals be reversed and that of the trial court affirmed, for costs and appropriate orders in the premises.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Cecil A. Morgan, attorney of record for petitioner, Leo H. Steele, hereby certify that a copy of the foregoing Brief of Petitioner has been served upon Charles E. France and the firm of Miley, Hoffman, France & Johnson, whose post office address is First National Bank Building, Oklahoma City, Oklahoma, and Alfred McKnight and the firm of Cantey, Hanger, McMahon, McKnight & Johnson, whose post office address is 1500 Sinclair Building, Fort Worth 2, Texas, attorneys for respondent, General Mills, Inc., by personally delivering two copies thereof to Alfred McKnight, one of the attorneys and a member of the firm of Cantey, Hanger, McMahon, McKnight & Johnson, on this ..... day of October, 1946.

CECIL A. MORGAN,
Attorney for Petitioner

I, Alfred McKnight, one of the attorneys of record for respondent General Mills, Inc., hereby acknowledge receipt of two copies of the foregoing Brief this ..... day of October, 1946.

ALFRED McKNIGHT
Attorney for Respondent